Padiberas Nasional Bhd v Kontena Nasional Bhd

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO MT 1–22–164 OF 2001
NORAINI ABDUL RAHMAN JC
30 OCTOBER 2009

Contract — Terms — Interpretation of terms — Rice cargoes — Claim for losses — Terms based on government circulars — Whether defendant liable for losses incurred

Shipping and Navigation — Carriage of goods — Claim for cargo losses — Parties — Whether defendant appropriate party to suit — Whether plaintiff should claim against insurer or ship owners

Shipping and Navigation — Freight charges — Retained — Request for refund — Whether entitled

Shipping and Navigation — Rice cargoes — Transportation from Vietnam — Delay supplying at relevant ports — Demurrage charges — Whether plaintiff failed to ensure cargo available at port for loading into ship — Whether claim established

The parties had been conducting business with each other since the 1970's based on government circulars, the latest being Surat Pekeliling Perbendaharaan Bil 8 Tahun 1991. The plaintiff was involved in the business of importing and marketing rice whilst the defendant, in the transportation of goods via sea. The plaintiff's claim against the defendant was for a sum of RM2,260,660.18 being the cargo losses incurred by them for the years 1995 to 1997. The defendant contended that the plaintiff should have made the claim either with the Malaysia Nasional Insurance ('MNI'), the insurers, or the relevant ship owners. During the trial, both the parties had relied heavily on the provisions of Surat Pekeliling 8/91, in particular cl 5.1.10. The plaintiff contended that by virtue of the above clause, the defendant was liable because it had failed to ensure that the rice cargoes were not lost or damaged. The defendant however, contended that their duty pursuant to the above clause was merely to assist the plaintiff in making its claims for loss or damage of the rice cargoes either against the MNI or the ship owners. The defendant had also counterclaimed against the plaintiff in respect of the sum of RM700,833.32 for demurrage charges for the shipments of rice cargoes from

Vietnam and the refund of RM1,173,666.91 being the 10% retention of freight charges. The defendant contended that Syarikat Perniagaan Peladang Malaysia ('SPPM') had ordered the rice from Vietnamese suppliers since the plaintiff could not do so on it's own. Because of the delay in supplying the rice at the relevant ports, the defendant was required to pay demurrage charges to Inter Maritime Management ('IMM').

Held, allowing the plaintiff's claim in part and the defendant's counterclaim with costs:

(1) The language used in cl 5.1.10 is clear. The defendant is to ensure that there is no loss or damage to the plaintiff's rice cargoes and in the event it did occur, and should the plaintiff choose to make claims against MNI or the ship owners, then it is the duty of the defendant to assist. However, there was no evidence that the plaintiff had chosen to do so (see para 9).

(2) There was no proof of the fact that SPPM had ordered the rice which was transported by ships owned by IMM on behalf of the plaintiff. There was no agreement or other supporting documents to that effect. Although there was correspondence ie a letter from the defendant to the plaintiff regarding demurrage charges, it did not mention about the relationship between the plaintiff and SPPM. Again, there was no indication of any relationship between the two (see para 14).

(3) The 10% retained freight charges were for the purpose of deducting any cargo claims and the said retained freight charges rightfully belonged to the defendant. Hence, the plaintiff had to pay the defendant (see para 19).

[Bahasa Malaysia summary

Pihak-pihak telah menjalankan perniagaan sesama sendiri semenjak tahun 1970an berdasarkan pekeliling kerajaan, yang paling terbaru adalah Surat Pekeliling Perbendaharaan Bil 8 Tahun 1991. Plaintif terlibat di dalam perniagaan mengimport dan menjual beras manakala defendan pula dalam penghantaran barangan melalui laut. Tuntutan plaintif terhadap defendan adalah untuk jumlah sebanyak RM 2260,660.18 iaitu kerugian muatan yang dialami oleh mereka bagi tahun 1995 hingga 1997. Defendan menghujah bahawa plaintif sepatutnya membuat tuntutan sama ada daripada Malaysia Nasional Insurance ('MNI'), syarikat insurans, atau daripada pemilik kapal yang berkenaan. Semasa perbicaraan, kedua-dua pihak menyandar sepenuhnya atas peruntukan Surat Pekeliling 8/91, khususnya klausa 5.1.10. Plaintif menghujah bahawa disebabkan oleh klausa di atas, defendan bertanggungjawab kerana ia telah gagal untuk memastikan bahawa muatan beras tersebut tidak hilang atau rosak. Defendan walau bagaimanapun, menghujah bahawa tanggungjawab mereka menurut klausa di atas hanyalah

untuk membantu plaintif dalam membuat tuntutan untuk kerugian atau kerosakan muatan beras sama ada terhadap MNI atau pemilik-pemilik kapal. Defendan juga membuat tuntutan balas terhadap plaintif berkaitan dengan jumlah RM700,833.32 untuk bayaran kelewatan penghantaran muatan beras dari Vietnam dan pengembalian RM1,173,666.91 iaitu 10% pengekalan caj pengangkutan. Defendan menghujah bahawa Syarikat Perniagaan Peladang Malaysia ('SPPM') telah memesan beras daripada pembekal Vietnam oleh sebab plaintif tidak boleh melakukannya sendiri. Disebabkan oleh kelewatan dalam membekalkan beras ke pelabuhan yang berkenaan, defendan disuruh membayar caj kelewatan kepada Inter Maritime Management ('IMM').

Diputuskan, membenarkan sebahagian tuntutan plaintif dan tuntutan balas defendan dengan kos:

(1) Bahasa yang digunakan di dalam klausa 5.1.10 adalah jelas. Defendan perlu memastikan bahawa tidak ada kerugian atau kerosakan kepada muatan beras plaintif dan jika ia masih berlaku, dan jika plaintif memilih untuk membuat tuntutan terhadap MNI atau pemilik-pemilik kapal tersebut, maka ia adalah tanggungjawab defendan untuk membantu. Walau bagaimanapun, tidak ada keterangan bahawa plaintif telah memilih untuk berbuat demikian (lihat perenggan 9).

(2) Tidak ada bukti mengenai fakta bahawa SPPM telah memesan beras yang diangkut melalui kapal yang dimiliki oleh IMM bagi pihak plaintif. Tidak ada perjanjian atau lain-lain dokumen yang menyokongnya. Walaupun terdapat surat-menyurat iaitu surat daripada defendan kepada plaintif mengenai caj kelewatan, ia tidak menyatakan mengenai hubungan di antara plaintif dengan SPPM. Oleh itu, tidak ada sesuatu yang menunjukkan hubungan di antara keduanya (lihat perenggan 14).

(3) Caj pengangkutan 10% yang dikekalkan adalah bertujuan untuk menolak apa-apa tuntutan terhadap muatan dan caj pengangkutan yang dikekalkan tersebut secara sahnya milik defendan. Oleh itu, plaintif perlu membayar kepada defendan (lihat perenggan 19).]

Notes

For cases on interpretation of terms, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 5361–5366.

For cases on shipping and navigation generally, see 11 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 978–1726.

Cases referred to

Bahamas International Trust Co Ltd v Threadgold [1974] 1 WLR 1514, HL (folld)

A *NVJ Menon v The Great Eastern Life Assurance Co Ltd* [2004] 3 MLJ 38, CA (refd)
Silver Concept Sdn Bhd v Brisdale Rasa Development Sdn Bhd (formerly known as Ekspidisi Ria Sdn Bhd) [2005] 4 MLJ 101, CA (folld)

B *Philip Teoh (Philip Teoh & Co) for the plaintiff.*
N Selvam (Karamjit Kaur with him) (H Karamjit & Co) for the defendant.

Noraini Abdul Rahman JC:

C FACTS

[1] The plaintiff and the defendant had been conducting business with each other since 1970's based on government circulars, the latest being Surat Pekeliling Perbendaharaan Bil 8 Tahun 1991 ('Surat Pekeliling 8/91'). The D plaintiff's business amongst others is to import and market rice. The defendant's business is amongst other, sea transportation. The plaintiff would import rice and the defendant would make arrangement to transport rice cargoes from port of loading to port of unloading. The plaintiff's claim is for a sum of RM2,260,660.18 for losses to their rice cargoes imported from E various ports overseas to various ports in Malaysia for the years 1995 to 1997. The defendant's contention is that the plaintiff had sued the wrong party. Instead of suing the defendant, the defendant's contention is that the plaintiff should have claimed cargo losses from either it's insurer Malaysia Nasional Insurance ('MNI') or the relevant shipowners.

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[2] It is noted during the trial that both parties had relied heavily on the provisions of Surat Pekeliling 8/91 and had treated it as an agreement regulating the conduct of both parties. Both parties had interpreted the Surat Pekeliling 8/91 especially cl 5 to advance arguments for their case. As such the G court is of the opinion that the Surat Pekeliling 8/91 is an agreement between both parties.

[3] At the outset, it is to be noted that there are references made to three agreements as follows:

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(a) the agreement between the plaintiff and the defendant ie Surat Pekeliling 8/91;

(b) an insurance agreement between the plaintiff and Malaysia Nasional Insurance; and

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(c) charter party agreements between the defendant and various shipowners.

The trial went on for eight days. The plaintiff had one witness and the defendant had three witnesses.

[4] In the case of *NVJ Menon v The Great Eastern Life Assurance Co Ltd* [2004] 3 MLJ 38, Gopal Sri Ram JCA (as he then was) said:

> It would be noticed that we have in arriving at our aforesaid conclusion made no reference to the oral evidence led at the trial as to the meaning and interpretation of the contract between the parties. This is because the construction of a contract is a question of law for determination by the court and not by witnesses through their oral evidence.

As Lord Diplock observed in *Bahamas International Trust Co Ltd v Threadgold* [1974] 1 WLR 1514:

> In a case which turns, as this one does, on the construction to be given to a written document, a court called on to construe the document in the absence of any claim to rectification, cannot be bound by any concession made by any of the parties as to what its language means. That is so even in the court before which the concession is made; a fortiori in the court to which an appeal from the judgment of the court is brought. The reason is that the construction of written document is a question of law. It is for the judge to decide for himself what the law is, not to accept it from any or even all of the parties to the suit; having so decided it is his duty to apply it to the facts of the case. He would be acting contrary to his judicial oath if he were to determine the case by applying what the parties conceived to be the law, if in his own opinion it were erroneous.

The honourable judge of the Court of Appeal continued:

> When it comes to the meaning of words, it does not matter whether they appear in a contract or written law, the result is the same. The point is illustrated by the judgment of Thompson J (as he then was) in *AE Reynolds v Public Prosecutor* [1956] MLJ 101 at p 103:
>
> > It may be that the learned president accepted the evidence of the various functionaries of the Police Department who gave evidence as to what they considered to be the meaning of the relevant orders as conclusive. If so, I think he was wrong. Whatever may be the attitude of government functionaries who have to deal with these financial general orders there is nothing sacrosanct about them. They were not brought down from Pisgah by any bureaucratic Moses. They are written words and like any other written words what they mean is a matter of construction. It is no concern of mine as a judge what civil servants do among themselves. As far as a judge is concerned, they can say that black is white and for the purposes of their on activities black is white. But when the criminal law and its sanctions are invoked and any question of construction is involved then that is a question for the court to decide and not any financial assistant or even any superintendent of police who happens to be in charge of records.
> >
> > So too here. It matters not a jot to us what the plaintiff thought his entitlements under the contract with the defendant were. Neither does it matter to us what the defendant's witnesses thought of the way in which that contract ought to be interpreted. Their views are entirely irrelevant; as irrelevant as the views of the witnesses who gave their interpretation of the financial orders in *Reynolds*.

A In the instant case, the learned judge referred to the oral testimony and relied upon it for the interpretation of the agreements and circulars. That, in our view is clearly an inadmissible method of construction

B **[5]** Again, in the Court of Appeal case of *Silver Concept Sdn Bhd v Brisdale Rasa Development Sdn Bhd (formerly known as Ekspidisi Ria Sdn Bhd)* [2005] 4 MLJ 101, Abdul Kadir Sulaiman JCA (as he then was) said:

C The construction of contract is a question of law to be determined by this court. This court is not bound by the admission of witnesses or the concession made by counsel in the court below.

It is clear from both cases cited above that it is the court and not witnesses or counsel who would determine on the construction of the contract or agreement. As such, the evidence given by DW2 and DW3 cannot be taken D into consideration. Both witnesses had testified that the plaintiff should have sued or made claims against either MNI or the relevant shipowners.

[6] I now turn to the Surat Pekeliling 8/91. As was said earlier, both parties had relied heavily on that Surat Pekeliling but each with their own E interpretation.

[7] The relevant clauses are:

F 5. TUGAS-TUGAS KONTENA NASIONAL SDN. BHD./MALAYSIAN SHIPPING AGENCIES SDN. BHD.

5.1 . Kontena Nasional Sdn. Bhd./Malaysian Shipping Agencies Sdn. Bhd. akan menjalankan semua tugas berkaitan dengan penghantaran bagi import dan eksport termasuk tugas-tugas berikut:-

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5.1.1 Menghubungi pembekal dan pengilang yang mana pesanan telah dibuat oleh Kerajaan bagi tujuan pengangkutan;

5.1.2 Menghubungi kontraktor-kontraktor dan pembekal serta pengilang mereka yang mana pesanan telah dibuat oleh kontraktor untuk tujuan H pengangkutan;

5.1.3 Mendapatkan maklumat-maklumat bagi tindakan insurans semula daripada kontraktor-kontraktor, pembekal-pembekal dan pengilang-pengilang mengenai senarai pembungkusan, inbois pembekal, nilai sesuatu penghantaran, pelabuhan/lapangan terbang muatan dan tarikh I belayar/berlepas, pelabuhan/lapangan terbang pemunggahan dan tarikh ketibaan;

5.1.4 Di dalam keadaan di mana Kontena Nasional Sdn. Bhd./Malaysian Shipping Agencies Sdn. Bhd. gagal memenuhi Fasal 5.1.3. di atas dan di dalam masa yang sama berlaku apa-apa kehilangan, kerosakan atau

kemusnahan terhadap dagangan tersebut semasa pelayaran, maka Kontena Nasional Sdn. Bhd./Malaysian Shipping Agencies Sdn. Bhd. hendaklah membayar kepada kerajaan sebanyak 100% daripada nilai sesuatu konsaimen tersebut;

5.1.5 Memberitahu kontraktor-kontraktor, pembekal dan pengilang bila pemunggahan akan dibuat dan memberitahu Kerajaan mengenai pengiriman barang-barang, tarikh dijangka bertolak dan tarikh dijangka tiba penghantaran, nama kapal dan syarikat pengangkutan, berat barangan dan lain-lain keterangan yang difikirkan berkaitan setelah diterima daripada pembekal:

— bagi pengangkutan melalui laut 14 hari sebelum ketibaan kapal di pelabuhan pemunggahan;

— bagi penghantaran melalui udara 4 hari sebelum ketibaan pesawat di lapangan terbang pemunggahan.

5.1.6 Membantu kontraktor, pembekal dan pengilang seperti yang diperlukan oleh Kerajaan di dalam pembungkusan yang 'seaworthy and airworthy' bagi 'forwarding' barang-barang secara 'ex-work';

5.1.7 Tertakluk kepada perlaksanaan tugas dalam Fasal 5.1.3, Kontena Nasional Sdn. Bhd./Malaysian Shipping Agencies Sdn. Bhd. akan menempah ruang kapal bagi barang-barang mengikut arahan Kerajaan dan menentukan tarikh pengiriman. Apabila menerima maklumat daripada kontraktor, pembekal atau pengilang bahawa barang-barang telah siap bagi diangkut, Kontena Nasional Sdn. Bhd./Malaysian Shipping Agencies Sdn. Bhd. akan mengambil langkah segera bagi menguruskan penghantaran barang-barang tersebut;

5.1.8 Menyediakan 'Bill of Lading', 'Airway Bill' dan 'Forwarders Certificate of Receipt' seperti yang dikehendaki oleh Kerajaan;

5.1.9 Menerima daripada pembekal hanya salinan inbois, 'Packing List', 'Certificate of Origin' dan lain-lain suratan yang berkaitan di pelabuhan muatan dan selepas itu berhubung dengan jabatan-jabatan Kerajaan yang bersangkutan dengan penghantaran tersebut sekurang-kurangnya 14 hari sebelum ketibaan kapal di pelabuhan pemunggahan bagi dagangan-dagangan yang berasal dari Amerika Syarikat dan Kanada, serta dalam masa 14 hari sebelum ketibaan kapal itu di pelabuhan pemunggahan bagi dagangan-dagangan yang berasal dari Eropah, Timur Jauh dan Australia/New Zealand.

5.1.10 Memastikan tidak ada kehilangan atau kerosakan atau kelewatan kepada barang-barang Kerajaan dan membantu Kerajaan di dalam membuat tuntutan bagi apa-apa kehilangan atau kerosakan atau kelewatan kepada barang-barang kerajaan;

5.1.11 Hadir bila perlu di pelabuhan-pelabuhan di luar negeri dan dalam negeri bagi menerima barang-barang untuk dihantar kepada Kerajaan kecuali barang-barang yang dimasukkan ke dalam kontena. Oleh itu penerimaan barang-barang tersebut mestilah berasaskan kepada bukti suratan yang

dikeluarkan oleh pembekal dan lain-lain pihak yang berkenaan. Untuk tujuan tersebut, Kontena Nasional Sdn. Bhd./Malaysian Shipping Agencies Sdn. Bhd akan menjalankan:-

(a) Tidak kira dalam apa keadaan sekalipun, memberi resit bersih (clean receipt) bagi penerimaan barang-barang yang dikhuatiri rosak atau hilang, resit hanya boleh diberi dengan bantahan bertulis atau catatan bertulis di atas nota serahan (delivery order);

(b) Mengadakan 'survey' ke atas barang-barang khas yang akan ditentukan oleh Kerajaan dan bagi barang-barang yang rosak semasa penyerahan atau di stor-stor 'transit' atau 'Port Authority Shed' di pelabuhan-pelabuhan;

(c) Menasihatkan Kerajaan bila masanya sesuatu tuntutan perlu dilakukan terhadap barang-barang yang hilang atau rosak.

The plaintiff submitted that there were two limbs to cl 5.1.10. Clause 5.1.10 is again reproduced here:

5.1.12 Memastikan tidak ada kehilangan atau kerosakan atau kelewatan kepada barang-barang Kerajaan (*first limb*) dan membantu Kerajaan di dalam membuat tuntutan bagi apa-apa kehilangan atau kerosakan atau kelewatan kepada barang-barang Kerajaan (*second limb*);

[8] It is the plaintiff's contention that by virtue of the first limb, the defendant is liable because it failed to ensure that the rice cargoes were not lost or damaged. The defendant on the other hand contended that it's duty is only to assist the plaintiff in making claims for loss or damage of the rice cargoes against either the MNI or the shipowners. The defendant also contended that the plaintiff's rice cargoes were insured up to the value of RM6m per voyage with MNI. Also, the plaintiff have the option to make claims against the shipowners.

[9] After considering cl 5.1.10, the court is of the opinion that the language used in 5.1.10 is clear. The defendant is to ensure (memastikan) that there is no loss or damage to the plaintiff's rice cargoes and in the event such things occurring, then if the plaintiff chooses to make claims against MNI or the shipowners, then it is the duty of the defendant to assist. However, there is no evidence that the plaintiff had chosen to do so. The plaintiff had in fact relied on the first limb and make claims against the defendant.

[10] The plaintiff through PW1 had gone at great length to prove its claims found at lampiran A of the statement of claim together with this supporting documents by way of letters of claims, debit notes and in some cases also by the survey reports as in bundles B, C, H1 and H2. I am therefore allowing the plaintiff's claim as prayed for in (i), (iii), (iv) and (v) of the statement of

claim.

COUNTERCLAIM

[11] I now turn to the defendants' counterclaim. There are two sums to the counterclaim, ie:

(a) RM700,833.32 for demurrage charges, and

(b) Refund of RM1,173,666.91 being the 10% retention of freight charges.

DEMURRAGE

[12] The defendant is claiming demurrage for shipments of rice cargoes from Vietnam. DW2, in his witness statement question 21 said the following:

21.

Q: Was demurrage charges imposed on Kontena Nasional by the shipowner for the rice shipments of the Plaintiff?

A: Yes.

(a) Shipping Company Inter Maritime Management Sdn Bhd [IMM] being the shipowner have charged demurrage charges, which can be seen at the documents in pgs 29 to pg 171 Ikatan Dokumen Defendan.

(b) For rice supplies from Vietnam the Plaintiff has to go through an entity called Syarikat Perniagaan Peladang [SPPM] in Malaysia.

(c) SPPM *on behalf of the Plaintiff* places the order for rice from Vietnamese suppliers (Emphasis added.).

(d) When the Vietnamese suppliers delay in supplying the rice at the port despite and after giving Notice of Cargo Readiness, and the ship is already at the port ready to load the rice cargo and are unable to do so and the loading of rice into the ship has extended the time given, demurrage charges are imposed by the shipowner.

(e) The shipowner then claims demurrage from the Defendant based on the charterparty.

(f) Demurrage charges was imposed by IMM to the Defendant as the Defendant on behalf of the Plaintiff chartered space in their ship. The delay occurred as a result of the Plaintiffs supplier or agent at the overseas port in failing to ensure that the cargo is available at the port for loading into the ship. Therefore, the Plaintiff has to reimburse the Defendant for the said demurrage charges already paid by the Defendant.

(g) The Defendant also wrote to the Plaintiff to pay the demurrage charges already paid by the Defendant. This is evidenced by documents from pages 29 to 171 Bundle D and at pages 172 & 173 where the details of demurrage

charges incurred for all IMM vessels less dispatch charges totaling RM766,650.17 (USD 306,660.07 x 2.5) is set out.

(h) KN have paid the demurrage charges to IMM and the payment evidence is from pages 23 to pages 28 Bundle D amounting to RM700,000.00.

(i) The payments made by the Defendant were received by one of the staff of IMM and Datuk Kamaruddin himself.

[13] DW2 testified that the demurrage charges claimed was for the transportation of rice cargoes from Vietnam. He also testified that Syarikat Perniagaan Peladang Malaysia ('SPPM') ordered rice from Vietnamese suppliers since the plaintiff cannot do so on it's own. Because of the delay in supplying rice at the relevant ports, the defendant was asked to pay demurrage charges to Inter Maritime Management ('IMM').

[14] The court is of the opinion that there is no proof of the fact that SPPM had ordered rice which was transported by ships owned by IMM on behalf of the plaintiff. There is no agreement or other supporting documents to that effect. Although there were correspondence ie a letter from the defendant to the plaintiff regarding demurrage charges, it did not mention about the relationship between the plaintiff and SPPM. In fact, the letter contained the following words:

> Mohon kerjasama pihak BERNAS supaya tuntutan ini dimajukan kepada pihak SPPM bagi tindakan mereka selanjutnya.
>
> (see pp 172–173 of bundle D).

[15] The letter from the plaintiff to the defendant at p 174 (bundle D) had the following paragraph:

> Pihak BERNAS hanya akan memproses invoice setelah mendapat bayaran dari pihak pembekal iaitu Syarikat Perniagaan Peladang MADA (SPPM).

[16] Again there is no indication of any relationship between the two. In any event, why should the plaintiff say these words if in fact they were the ones ordering the rice through SPPM.

[17] For the reasons above, I dismiss the defendant's counterclaim for demurrage charges for the amount of RM700,833.32 with costs.

10% RETAINED FREIGHT CHARGES

[18] The defendant in their counterclaim claimed for the 10% retained freight charges which was retained by the plaintiff.

[19] The court is of the opinion that the plaintiff has to pay for freight charges and if it retained 10%, that 10% is still payable to the defendant. Of course, as was said during the trial, the 10% retained freight charges was for the purpose of deducting any cargo claims. From the plaintiff's own document at lampiran A to the statement of claim, it is stated:

Baki 10% Tambang Kapal. Jumlah — RM1,173,666.91

[20] The court is of the opinion that the 10% retained freight charges rightfully belong to the defendant. As such, I am allowing the counterclaim of RM1,173,660.91 with interests at 8%pa from 5 September 2002 till date of full and final settlement and costs.

Plaintiff's claim allowed in part and defendant's counterclaim allowed with costs.

Reported by Ashgar Ali Ali Mohamed